MICHAEL G. RANKIN
City Attorney
Baird S. Greene
Deputy City Attorney
William F. Mills
Principal Assistant Prosecuting City Attorney
Criminal Division
P.O. Box 27210
Tucson, AZ 85726-7210
(520) 791- 4104
AZ State Bar No. 005602
Pima Co. Computer No. 39364
e-mail: William.Mills@tucsonaz.gov
Firm No. 197900

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff/Petitioner/ Appellant/Petitioner, vs. JOSEPH COOPERMAN, Defendant/Respondent/ Appellee/Respondent,	**SUPREME COURT NO. CV-12-0319-PR** Court of Appeals: Division 2 **NO. 2 CA-CV 2011-0197** Pima County Superior Court No. CR 2011 7903 Tucson City Court Cause No. TR 10061595 **STATE'S SUPPLEMENTAL MEMORANDUM**

The State submits its Supplemental Memorandum,17B A.R.S., AR-CAP, Rule 23(f), at the invitation of this Court, to further explain how the decision of the Arizona Court of Appeals, Division Two, in *State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446 (App. 2012) directly contradicts and destroys the careful balance achieved in the prior Court of Appeals, Division One case, *Guthrie v. Jones*, 202 Ariz. 273, 43 P.3d 601 (App. 2002).

I. When Is Partition Ratio Evidence Admissible In A DUI Charge?

At the core of the conflict is a sharp difference in what creates the triggering event that allows a defendant in the traditional DUI charge of impairment, A.R.S. §28-1381(A)(1), to introduce the type of partition ratio evidence prohibited in the *per se* BAC charge, A.R.S. §21381(A)(2). *Guthrie* explained at length why partition ratio evidence, and the factors that go into it were irrelevant and thus inadmissible in the BAC charge, due to the statutory adoption of the 2100/1 ratio between blood and breath alcohol levels, and the statutory definition of alcohol concentration to mean either when established by a blood alcohol or a breath alcohol value.[1]

As for the DUI charge, it then said, "The State may elect, however, to establish alcohol concentration in order to take advantage of a statutory presumption."

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[1] *State v. Storholm*, 210 Ariz. 199, ¶10, 109 P.2d 94, 95-96 (App. 2005), stated the excluded evidence in *Guthrie* included the defendant's individual idiosyncracies and environmental factors.

Guthrie, ¶13, 43 P.3d, 604. Thus it is also true that the state may elect not to use the statutory presumption. This is key because then *Guthrie* directly quoted A.R.S. §28-1381(H)(3) (now (G)(3)) the statutory presumption that if a defendant's alcohol concentration is .10 or more (now .08 or more), then the defendant may be presumed to be under the influence of intoxicating liquor (impaired). The very next sentence is, "We come then to the question whether, when the State elects to employ breath test results to presumptively establish that a defendant was 'under the influence' while driving, the defendant may respond by introducing partition ratio evidence to counter the presumption. We answer that question in the affirmative." *Id.*, ¶14, 43 P.3d, 604.

Certainly then, by the rules of English grammar, and logic, *Guthrie* held that when the State invokes the statutory presumption of impairment, then the defendant is entitled to respond and counter-balance "the presumption." This is the second time the court said "when the State elects" to use the statutory presumption.

This is a vital distinction from *Cooperman's* finding that (which misinterpreted *Guthrie*, just as the trial court did) "the statutory presumption is raised in a prosecution for an (A)(1) offense whenever the state introduces evidence that a defendant had an alcohol concentration of .08 or more." *Cooperman*, ¶17, 282 P.3d, 451. *Cooperman* then compounded the error by stating, "Our interpretation of the statute (A.R.S. §28-1381(G)) is consistent with *Guthrie* which, as the city court points

out, 'carefully never implies that the [s]tate could choose not to use the presumption' despite introducing alcohol-concentration evidence in an (A)(1) prosecution." *Id*, (*Parenthetical supplied*.) As shown above this is exactly the opposite of what *Guthrie* actually held.

Nor is *Cooperman's* footnote six in support of its interpretation. While it is true that either party could invoke the appropriate part of A.R.S. §28-1381(G), it make no logical sense whatsoever, and may be potential malpractice for a defense attorney to ask for the statutory presumption of impairment in (G)(3). Certainly the defendant would be entitled to request a jury instruction in his favor, of not being impaired under (G)(1), or no presumption under (G)(2). However, presumably either of those two statutory presumptions would have to be predicated, just like for the state's use of (G)(3), by the introduction of actual evidence of such an alcohol concentration level.[2] Neither does *State v. Klausner*, 194 Ariz. 169, ¶18, 978 P.2d 654, 658 (App. 1998), in footnote six, provide such support. If anything it supports the State's interpretation of (G), because it held that even when the state invoked the

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[2] "The test for admissibility of evidence is not different for different parties. The constitution gives defendant the right to have exculpatory evidence admitted, but does not relieve him of the burden of meeting the evidentiary standards set for all parties ... We hold, therefore, that, whether offered by the state or the defendant, evidence of blood alcohol content is admissible upon the same evidentiary standard." *State v. Seidel (Deason)*, 142 Ariz. 587, 691 P.2d 678 (1984). (*Citations omitted*.)

presumption of impairment under (G)(3) for an alcohol reading within two hours of driving, the defendant could still invoke the presumption of no impairment under (G)(1), if it could present the necessary relation-back evidence of an alcohol concentration at or under .05, at the time of driving.

As for the trial court's duty to instruct juries, certain legal issues have been at the election of only one of the parties. For instance, whether to instruct on the defendant's right to silence when not testifying is usually left up to the defendant. *State v. McAlvin*, 104 Ariz. 445, 448, 454 P.2d 990 (1969), took the position that the better practice was to only give the instruction if requested by the defendant, but that it would not be reversible error if given with no request. Reaffirmed in *State v. Moreno*, 107 Ariz. 146, 483 P.2d 786 (1971). What crimes are charged and what evidence is brought into court to prove those charges is similarly within the sole province of the state. If the State does not invoke the statutory presumption in its presentation of its case, then there is not a basis to give it. This is particularly true here, where if the State elects to use the statutory presumption of impairment to put the force of law behind its case, it will knowingly open the door to the topic of partition ratio and all of its variants. If the State forgoes this additional weight to its case, then by the logic and wording of *Guthrie, supra*, there is no weight of law in the case or from a jury instruction to be "responded" to with partition ratio evidence.

II. Is Individual or Generic Partition Ratio Evidence Then Admissible?

The next conflict concerns what type of evidence would be admissible *if* the State chose to invoke (G)(3). *Guthrie* expressly stated:

> One means to prove that a particular defendant was not under the influence . . . , is to establish that the defendant's individual partition ratio differed from the standard 2100:1 ratio to a significant degree . . . evidence that a particular defendant's ratio is significantly greater (*sic*) is relevant, for it would have a tendency to rebut the presumption that the defendant was 'under the influence' at a certain breath alcohol concentration.

Id, ¶16, 43 P.3d 604. Certainly the language is unambiguous. It contemplates the defendant introducing evidence based upon his individual characteristics, not mere speculation about the general population. And contrary to the contention in *Cooperman* that this was mere dicta, (*Id*., 21, 282P.3d, 452) *Guthrie* actually re-emphasized this point in its conclusion:

> In a traditional DUI prosecution under §28-1381(A)(1), however, when the State uses breath test results to take advantage of the §28-1381(H) (now §28-1381(G)) presumption, partition ratio evidence may be relevant to rebut that presumption and thus admissible. . . Specifically finding that the municipal court erred by precluding Guthrie's effort to establish that his particular partition ratio on the date in question differed significantly from the norm, we vacate the latter conviction . .

Id., ¶18, 43 P.3d, 601 (*Parenthetical in the original.*) And while *Guthrie* did say that the Vermont Supreme Court had reached a similar conclusion in *State v. Hanks*, 772 A.2d 1087 (Vt.2001), it did not discuss the differences in the two states' statutory

permissive inferences of intoxication, nor the fact that *Hanks* allowed more general population partition ratio evidence. (Vermont's law says there "shall" be a permissive inference. *See* 23 V.S.A. §1204(a)(2). Perhaps that accounts for the broader evidence allowed.)

People v. McNeal, 46 Cal.4th, 1183, 210 P.3d 420 (2009) shows just how close a question this is. There the court of appeals distinguished between general and personal partition ratio evidence, concluding that the former was too indirect, and therefore only the later was admissible evidence to rebut their permissive statutory inference of impairment with a BAC reading over .08. *Id.,* 1200, 210 P.3d, 431. In reversing that distinction in its own decision, the California Supreme Court simply stated that it did not think such indirectness rendered the evidence irrelevant. It cited as support for its decision both *Hanks*, and *Guthrie* - failing to note the *Guthrie* actually was more in line with their own court of appeals. Additionally, California law, section 23610, only allows a presumption of impairment if the defendant's blood alcohol concentration is .08 or greater, as shown by analysis of blood, breath or urine. Thus for the prosecution to use the statutory presumption of impairment from a breath test, the partition ratio is always involved, unlike the Arizona presumption. *See McNeal*, 1197-98, 210 P.3d, 429. The State's position is that *Guthrie* and the California Court of Appeals in *People v. McNeal*, 66 Cal.Rptr3rd 212 (App. 2007)

actually have the better reasoning, although the California Supreme Court disagreed. If the defendant is going to be allowed rebuttal evidence, it ought to be based upon his own individual characteristics, not speculation about the general population.

Moreover, *Cooperman* carried the theory even further by determining that virtually *any* factor may be "relevant" to challenge breath alcohol testing. It found that the Defendant presented competent expert testimony that various physiological factors, apart from partition ratio evidence, *can* impact the ability of the Intoxilyzer to measure a defendant's breath alcohol. *Cooperman,* ¶¶26-30*,* 282 P.3d 454-55. There was, however, no offer of proof that any of these factors actually existed.

Cooperman cites to *McNeal, supra*., and says that a defendant charged under §28-1381(A)(1) is "[e]ntitled to introduce reliable evidence challenging the state's alcohol concentration..." *Cooperman*, ¶24, 282 P.3d at 453. However, with regard to the possibility of a defendant introducing his individual partition ratio and logically his own temperature, body temperature, breath temperature or breathing pattern, since these factors necessarily are part and parcel of "partition ratio, and whether it would be relevant to his breath results, Mr. Flaxmeyer stated:

> The problem is if I am a defendant, unless the police officer draws blood in close proximity to the time.... I can't prove it was the same value....

. . .

(See State's Appendix, Exhibit #4, Transcript of Evidentiary Hearing, Dated August 16, 2011, p. 125.) The trial court asked "scientifically would it be relevant?" Mr. Flaxmeyer specifically stated: " *I don't believe it is.*" *Id.* (*Emphasis added*).

Perhaps the Defendant's failure to offer relevant evidence, that his breath test reliability was affected by otherwise unsubstantiated generalities, is a result of the absence of such evidence in his case. He made no offer of proof, or evidence, of his partition ratio, his breath or body temperature, or his breathing pattern at the time of the test. This lack of substance to generalities was reinforced by *State v. Downie,* 117 N.J. 454, 462-63, 569 A.2d 242, 248, where the court noted that the experts failed to establish that the *theoretical effects* of the physical factors of mouth temperature, gender, body temperature and hematocrit were sufficiently concrete as to be significant, and more importantly, relevant. Thus, the proposed general defense evidence in this case on partition ratio should be excluded as irrelevant, prejudicial and potentially confusing or misleading.

Indeed, much of the testimony, at the August 16, 2011, hearing, centered on how hypothetical physical variables "could possibly" affect the results of a breath test, compared to a blood test, if the defendant had an elevated body or breath temperature, or hypo/hyper ventilation, or hematocrit. But the proffered general evidence had no basis in fact for this particular defendant, as there was no indication that his breath

tests were affected by any of the discussed variables. *(See State's Appendix, Exhibit #4, Transcript of Evidentiary Hearing, Dated August 16, 2011.)*

Given this lack of proof, any general evidence of body or breath temperature, or breathing patterns or hematocrit, on the comparison of simultaneous breath and blood testing - which was not done by this Defendant - should have been excluded. And contrary to *Cooperman's* conclusion, there is no evidence here tending to make any fact related to the accuracy of these breath tests more probable than not.

III. The Gate-Keeper Function Of The Courts Should Exclude Expert Opinion Testimony Without A Factual Basis.

This leads to a consideration of the proffered evidence within the context of Rule 702 of the Arizona Rules of Evidence. As amended, and in relevant part, Rule 702 provides that "A witness who is qualified as an expert ... may testify in the form of an opinion ... if ... (b) the testimony is based on sufficient facts or data; ... and (d) the expert has reliably applied the principles and methods to the facts of the case.[3] Additionally, the Rule "[r]ecognizes that trial courts should serve as gatekeepers...." *Comments to 2012 Amendment, Rule 702*. The import of this concept becomes apparent in reviewing the proffered "hypothetical factors," because "[w]hile expert

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[3] The rule was amended on January 1, 2012, without retroactivity language, but the general standard for expert testimony is procedural, rather than substantive. *See State v. Bible,* 175 Ariz. 549, 858 P.2d 1152, 1184-85 (App. 1999).

opinion can be based on hypothetical questions, such questions are proper [only] so long as they are based on facts in evidence." *Schmidt v. Gibbons*, 101 Ariz. 222, 418 P.2d 378 (1966), *cited in West v. Sundance Development Co.* 169 Ariz.579, 584, 821 P.2d 240, 245 (App. 1991); and "[t]he facts assumed in the hypothetical must be supported by evidence before the court." (*Citation omitted*). *International Harvester Co. v. Chiarello,* 27 Ariz App. 411, 414, 555 P.2d 670, 673 (App. 1976). *See also State v. Mauro,* 159 Ariz 186, 766 P.2d 59 (1988).

And lastly, as the United States Supreme Court articulated in *Kuhmo Tire Co., Ltd v. Carmichael,* 526 U.S. 137,154, 119 S.Ct 1167, 1177 (1999), "The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation." By analogy, the relevant issue is whether the Defendant's expert could reasonably determine *this* Defendant's partition ratio, or *any* of the factors that make up his partition ratio, differed from the standard. Did he have a basis to opine that there would have, with any degree of scientific certainty, been an impact on his individual breath tests. Logically, the answer is no.

Accordingly, the probative value of any *other* evidence, *e.g*. "hypothetical" factors, is substantially outweighed by the danger of unfair prejudice, and could only serve to confuse the issue and or mislead the jury, and waste time. This Defendant offered only general evidence on breath and body temperature, breathing patterns,

hematocrit, and their "possible" effects on breath testing. However, applying the logic of *Guthrie*, and the proper requirements of Rule 702, such testimony should not be allowed unless there is specific evidence of the individual Defendant's own characteristics at the time of the test.

IV. The Science of Alcohol Breath Testing Shows The Chance of It Being Higher Than The Blood Alcohol Value To Be Extremely Low.

Because the science in breath testing is so central to this action, and so universally accepted in the breath testing community, a short review is warranted.[4] Alcohol in the carotid arteries travels to the brain and causes intoxication. Alcohol in the breath does not cause impairment. Impairment is caused when alcohol is absorbed into the bloodstream, and transported to the central nervous system and the brain. *See Guthrie*, ¶5, 43 P.3d, 602. As a practical matter, however, it is impossible to measure alcohol in a person's carotid arteries, or brain. *See People v. McNeil,* 46 Cal 4th 1183, 1190-1191, 210 P.3d 420, 424 (2009). Nevertheless, the scientific community largely agrees that measuring alcohol in venous blood, or breath, provides a good indication of the amount of alcohol in the brain. *Id; See also Guthrie,* ¶5, 43 P.3d, 602. (While blood alcohol, rather than breath, establishes impairment, breath alcohol readings

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[4] Very detailed accounts can be found in *Guthrie v. Jones,* 202 Ariz. 273, 43 P.3d 601 (App. 2002), *People v. McNeil,* 46 Cal 4th 1183, 210 P.3d 420 (2009), and *State v. Downie,* 117 N.J. 450, 460 (N.J. 1990).

nonetheless are indicative of blood alcohol content, *Id.*)

Breath testing instruments are based on the scientific principle of Henry's Law, which states the concentration of a volatile substance (alcohol) dissolved in a liquid (blood) is directly proportional to the concentration of that substance in the air next to that liquid. *McNeil, supra*, 1191, 210 P.3d, 424; Annot. 90 A.L.R. 4th 155, 160 (1991). It is this principle, of direct proportionality, which forms the basis for the conversion to a blood alcohol result (alcohol in a liquid solution) from a breath alcohol sample (alcohol in the air). Henry's Law assumes a state of equilibrium, where factors such as pressure and temperature are fixed. Because the ratio can change, depending upon factors such as pressure and temperature, it is referred to as a *coefficient*, rather than a constant.

In the human body, gases in the blood and airway are exchanged deep in the lungs at the alveoli, which are the tiny air sacs at the end of the bronchioles. Harvey M. Cohen and Joseph B. Green, *Apprehending and Prosecuting the Drunk Driver,* section 7.04[1] (Matthew Bender ed. 2002). These air sacs are in close proximity to the capillary blood of the lungs, and are separated only by very thin membranes. *Id.* In this area, the free movement of alcohol from the blood to the breath occurs across these membranes. *Id.* This "free movement area" is known as "alveolar air space." Alcohol in the blood diffuses into alveolar air space in the lungs and is exhaled in the

breath. *McNeal,* 1190-91, 210 P.3d, 424; *see also Downie,* 458, 569 A.2d, 246.

However, testing "purely alveolar air" cannot be done directly, at its location deep within the lung - because such testing would be extremely invasive and dangerous for the subject involved, and the air space is so small. *See* Harvey M. Cohen and Joseph B. Green*, Apprehending and Prosecuting the Drunk Driver, section 7.04[1].* Instead, testing is done by a person giving a breath sample, with a prolonged exhalation, and the analysis is then made on the last portion of the deep breath, since it approximates the alveolar air space where the gas exchange is occurring. *See Defense of Drunk Driving Cases,* Volume 2, section 18.01(2) (3d ed. 1996); and *Downie,* 458, 569 A.2d, 246. The lungs of a live human, however, do not exist in a fixed state free of pressure, volume and temperature, and factors of temperature, method of breathing, and water content of the blood (hematocrit level) have long been known to affect the blood/breath ratio. *See Guthrie* ¶7,43 P.3d, 603 *;* and 90 A.L.R. 4th, 160. Given these variable factors, a blood/breath ratio is not a constant for all people or for the same person under different conditions. *See Guthrie,* ¶7, 43 P.3d, 603; *Downie*, 460, 569 A.2d 246-7; and *McNeal*, 1191, 210 P.3d, 424-25.

The breath-test devices use a ratio of 2100:1, known as the partition ratio. However, "[t]he 2100:1 partition ratio, in its absolute simplicity belies the fact that each subject's partition ratio is affected by a host of complex physiological variables."

Downie, 459, 569 A.2d, 246. The debate over the partition ratio and the factors that affect it has been raging since the 1930s, *Id*., 457, 569 A.2d, 245, and yet it is still scientifically valid[5]

Downie, 459-62, 569 A.2d, 246-48, thoroughly documents the overwhelming validity of using 2100:1 as the partition ratio in spite of all the "potential" variables, because in real life multiple breath tests, or simultaneous breath and blood comparison tests, the breath test results either accurately measure or underestimate the subject's blood alcohol level in almost all cases. Dr. Borkenstein estimated that breath test results are lower than the blood alcohol concentration in 9% of case, and estimated they would read higher in three out of one thousand .*Id*. Mr. Harding estimated the breath tests were on average lower than blood by 11%. *Id*. Dr. Duboski, a leading authority on breathalyzer testing, tested over 1,000 people in two studies, using two different methods of calculation, found that in 86% of cases the breath result underestimated the blood-alcohol level. *Id*. Of the other 14%, he said 2.3 % were exactly the same as blood; that in 9.4% of cases it only overestimates at the third

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[5] The conversion factor of 2100:1 is used, essentially without exception, in breath testing devices throughout the United States; although, according to Dr. Borkenstein, the inventor of the breathalyzer machine, 2300:1 is a more accurate conversion factor. However, researchers and members of the National Safety Council adopted the 2100:1 ratio because they wanted to err in favor of the person tested. *Downie,* 460, 569 A.2d, 246-47, and *McNeal,* 1192, 210 P.3d, 425.

decimal point - which is truncated off by breath testing devices and hence has no effect. Finally he found in only 2.3% of cases did it possibly overestimate the blood-alcohol level. *Id*.

Dr. Jones provided testimony, regarding empirical studies, conducted in Sweden, which indicated that 98.2 percent of the population had a partition ratio greater than 2100:1 (thus benefitting a suspect). Individual partition ratios can be determined by simultaneously measuring breath-alcohol concentration and blood-alcohol concentration over a period of time. *Id.*

The net import of the science behind breath testing is that neither the possible partition ratio variance; nor any of the factors that go into it, are of any real consequence scientifically, because the studies have adequately demonstrated that the standard is properly set to favor defendants. Indeed, as has been stated, "[d]efendants charged with drinking and driving are not entitled to a perfect breath test, but a reasonably reliable one, and thus it is not enough that a defendant identify collateral irregularities..." *State v. Velasco,* 165 Ariz. 480, 486-87, 799 P.2d 821, 827-28 (1990) (no requirement scientific process underlying alcohol testing be "absolutely perfect" as long as reasonably reliable*) cited in State v. Bernini*, 222 Ariz 607, , 218 P.3d 1064, (App. 2009). *See also Mack,* 196 Ariz. 541, ¶ 12, 2 P.3d at 104.

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IV. The Legislative Impact Upon Chemical Testing.

In 1998 the Legislature amended A.R.S. §28-101(A)(1), *see 1998 Ariz. Session Laws, Ch240§1,* by changing the type of prohibited alcohol level to include breath. The term "alcohol concentration," which was formerly defined solely in terms of "grams of alcohol per 100 milliliters of blood," was redefined as "grams of alcohol per 100 milliliters of blood *or grams of alcohol per 210 liters of breath*." (*Emphasis added*.) Thus a DUI could be proved with either the specified blood-alcohol or breath-alcohol level. Converting a breath alcohol to its correlative blood alcohol level was no longer required. Previously, in 1988, the Arizona Legislature set the partition ratio at 2100:1. *See 1988 Ariz. Sess. Laws, Ch. 246 §3.*

Arizona also initiated another expense and resource reducing measure when it provided for the admission of breath test results without the need to call a criminalist in each case by enacting A.R.S. §28-692.03(A), now §28-1323. This legislative intent should also be considered, as part of the balancing between the interests of the parties as to partition ratio. As this Court first articulated in *Fuenning v. Superior Court County of Maricopa,* 139 Ariz. 590, 680 P.2d 121 (1983), and then in *State ex rel. Collins v. Seidel (Deason),* 142 Ariz. 587, 691 P.2d 678 (1984), that "[t]he procedures followed by the Rules [of Evidence] require expert testimony involving a fairly substantial expense and consumption of time ... [I]n essence, the statute does away

with the necessity of expert testimony and permits the court to admit evidence of breath test analysis by showing that the test was administered with an approved device....” *Seidel*, 591, 691 P.2d, 682.

CONCLUSION

“Partition ratio,” which has been scientifically measured, legislatively agreed upon, and upheld by the courts, necessarily incorporates the factors that the Defendant’s expert has proposed to testify about. The expert has attempted to disguise these factors as non-partition ratio, or “stand alone” evidence; but the factors are, and always have been, considered to be part of the broad definition of “partition ratio.” Therefore, under *Guthrie* and *Storholm,* the evidence should properly be excluded.

The issues presented establish that *Cooperman* has created an irreconcilable, and logically inconsistent, rift between the divisions of the Arizona Court of Appeals. It allows defendants to use expert testimony, regarding a variety of generally possible factors affecting partition ratios, which amounts to pure speculation, in direct contravention of *Guthrie*, *Storholm* and Rule 702.

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The problem created, apart from the undeniable fact that such testimony is necessarily tied to the conversion of breath to blood alcohol concentrations, is that it allows in terms of a "hypothetical individual's " physiological characteristics that the Defendant's own expert plainly stated "can't be parsed out from the partition ratio." *State's Appendix Exhibit #4, Transcript of E. H., Dated August 16, 2011,p 136.* This necessarily runs afoul of not only the "gate-keeping" function of the courts in Rule 702, but it also nullifies the careful balance achieved by *Guthrie*, which excluded such evidence unless the State chose to invoke the statutory presumption of impairment. Even then it only envisioned allowing evidence of the defendant's own characteristics which differed substantially from the standards. Otherwise it is only sheer speculation that there *could* have been a variety of factors present.

The only manner in which the proffered evidence *may* become relevant, and admissible, is if the State utilizes the breath alcohol results, and the statutory presumption contained in A.R.S. §28-1381(G)(3), to prove that the Defendant is "impaired to the slightest degree," in an A.R.S. § 28-1381(A)(1) prosecution. Then, if an adequate foundation is laid indicating that *this particular* Defendant has been independently tested and actually does fall within the portion of the population that differs significantly from the statical population norm of 2100 to 1, such evidence would be relevant and admissible. Neither occurred here. Therefore, no partition ratio

evidence, or "physiological variables" should have been allowed.

RESPECTFULLY SUBMITTED this 8 th day of April, 2013

STATE OF ARIZONA

/S/_____
William F. Mills
Attorney for the State

Copies e-filed or e-mailed and/or delivered
this 8th day of April, 2013 to:

Clerk of the Court,
The Arizona State Supreme Court

See next page for further routing...

Certified Mail and/or Delivered and/or e-mailed and/or mailed, and/or scanned Copies this 08th day of April, 2013, to:

Stephen Neimiec
Assistant City Public Defender
Tucson City Public Defender
103 E. Alameda - Suite 601
Tucson, AZ 85701

Stephen Barnard, Esq.
945 N. Stone Ave.
Tucson, AZ 85705

James Nusku, Esq
216 N. Main Ave
Tucson, AZ 85701

Elizabeth Ortiz # 012838
Executive Director
Faith C. Klepper, # 018444
Arizona Prosecuting Attorneys' Advisory Council
Attorneys for Amicus Curiae

Brad Carlyon
Navajo County Attorney
Neill Perry
Deputy Navajo County Attorney
P.O. Box 668
Holbrook, Az 86025

Andrew Davidson– andrew_davidson@tempe.gov

WFM/VRD/sb

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